Supreme Court, U.S.
FILED
AUG 14 1997
CLERK

No. 96-2052

IN THE
SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1996

ROSE BECERRA, individually and as next friend of
JUAN DOE, a minor

Petitioners,

vs.

HOUSTON INDEPENDENT SCHOOL DISTRICT, JOAN
RAYMOND, SYLVIA MACY and BARBARA TURNER

Respondents.

ON PETITION FOR WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

RESPONDENTS' BRIEF IN OPPOSITION

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QUESTION PRESENTED

The Petitioner's son was molested by one of his former teachers. The molestation occurred five months after the student stopped attending the teacher's school. The Petitioner asserts a violation of substantive due process pursuant to 42 U.S.C. § 1983.

Did the Fifth Circuit properly affirm summary judgment where there was no evidence that the molestation occurred "under color of state law" as required by 42 U.S.C. § 1983 and where there was no other evidence that any abusive conduct occurred during the time that the student was enrolled at the teacher's school?

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RESPONDENTS' BRIEF IN OPPOSITION

The Respondents, Houston Independent School District, Joan Raymond, Sylvia Macy, and Barbara Turner respectfully request that this Court deny the petition for writ of certiorari, which seeks review of the Fifth Circuit's decision in this case. The decision of the Fifth Circuit is reported at 105 F.3d 1042 (5th Cir. 1997). The opinion of the Fifth Circuit denying Petitioners' petition for rehearing and rehearing *en banc* also is reported at 105 F.3d 1042 (5th Cir. 1997).

SUMMARY

The Petition should be denied. First, because of evidentiary rulings made below, the Court need not ever reach Petitioner's Questions Presented. The Petitioner's argument is based on untimely evidence properly excluded by the courts below. To consider the Petitioner's argument, the Court first would have to determine whether the district court abused its discretion in excluding the evidence--an issue not even briefed by the Petitioner.

Second, contrary to the Petition, the decision below does not conflict with any other circuit court decision.

Third, granting the Petition would be futile. Even if the Petitioner could show that her son was molested by a teacher under color of state law, it is well settled that the school district and the teacher's supervisors may be not held vicariously liable for the molestation under 42 U.S.C. § 1983.

Although the facts of this case are tragic, this case involves the routine application of Rule 56 of the Federal Rules of Civil Procedure and well-settled rules of law to a particular set of facts. In the end, the Petitioner is merely asking the Court to provide yet another level of appellate review to the district court's determination that she failed to raise a genuine issue of material fact on an essential element of her claim.

STATEMENT OF THE CASE

Proceedings Below

The Petitioners, Rose Ruiz Becerra, individually and as next friend of Juan Doe, a minor ("Becerra"), filed suit against

the Houston Independent School District ("HISD"); three current or former HISD administrators, Joan Raymond, Barbara Turner, and Sylvia Macy (collectively the "Respondents"); and Jerry Asher, a former HISD teacher ("Asher"), on December 14, 1994, alleging violations of federal and state law. (10 R. 1-12). Raymond, Macy, and Turner moved for summary judgment on July 14, 1995. (R. 773, 803). On November 17, 1995, HISD moved for summary judgment. (R. 773, 803, 2836, 2039).[1] The Petitioner did not submit an affidavit from Juan Doe in response to either motion.

On February 14, 1996, the district court granted summary judgment in favor of HISD, Raymond, Macy, and Turner. (R. 2302-2320; 2992-2993). Becerra filed a motion for new trial on February 23, 1996, and submitted for the first time an affidavit from Juan Doe as well as an amended affidavit from her expert.[2] The motion for new trial was denied. (1 R. 2991). The district court issued a final judgment, severing this suit from the claims remaining against Jerry Asher. The district court's decision is reported at 921 F. Supp. 1538 (S.D. Tex. 1996).

Becerra appealed and, after oral argument, the Fifth Circuit affirmed the district court's judgment. Becerra filed a petition for rehearing and a suggestion for rehearing *en banc*, both of which were denied on March 27, 1997. An order denying the rehearing and rehearing *en banc* was issued April

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[1]Asher was not represented by counsel and never filed a motion for summary judgment.

[2]The Fifth Circuit's opinion incorrectly states that the affidavits were filed on February 13th rather than February 23rd. 105 F.3d at 1047 n.20.

7, 1997 and published with the original opinion at 105 F.3d 1042.

Becerra asserts in her Petition that the case against Jerry Asher proceeded to trial. (Pet. at 8.) The proceedings at that trial, including the testimony and the outcome, are not reflected in the record of this case. Indeed, the trial against Jerry Asher occurred after the Fifth Circuit heard oral argument in this case. Accordingly, Becerra's representations about Juan's alleged testimony at that trial are irrelevant to the question of whether summary judgment was mandated in this case.

Statement of Facts

The Petition contains numerous factual distortions and misrepresentations of the evidence. Becerra fails to disclose that some of her "facts" were not submitted until *after* summary judgment had been granted. The district court declined to allow Becerra's late evidence, and the Fifth Circuit held that the district court did not abuse its discretion in denying the request to consider additional evidence. 105 F.3d at 1047 n.20.

Because the Respondents disagree with Becerra's statement of facts, the Respondents provide their own:

The Houston Independent School District is the nation's fourth largest school district. It employs approximately 25,000 people in 225 schools and maintains a student population of approximately 194,000. (2 R. 2823.) Jerry Asher was employed as an elementary school music teacher from 1975 to 1992. His evaluations were consistently excellent, and he was known for putting on excellent music programs for children. (5 R. 1650; 2 R. 2700 p. 74; 2 R. 2694, 2596-2589; 5 R. 1697-1689.) In 1987, while teaching at HISD's Frost Elementary School, Asher was charged with indecency with a child. (2 R. 2823.) Dr. Joan Raymond, superintendent of schools, immediately suspended Asher. (2 R. 2824-2823; 8 R. 761-63.)

Asher's personnel file contains no documents reflecting any improper contact with students prior to the 1987 allegation. (3 R. 2322.)

Subsequently, a trial was held, and a jury acquitted Asher of all charges. (3 R. 2588; 2 R. 2823.) The jury did not believe the child. (3 R. 2588.) Notwithstanding the acquittal, Becerra asserts that it is "undisputed" that the child's allegation was true. (Pet. at 5.) Becerra also asserts that HISD had knowledge of unspecified admissions by Asher, but the record shows that the Respondents did not know about any alleged admissions of criminal wrongdoing by Asher. (2 R. 2798-2797; 3 R. 2566; 2 R. 2785-2786; 2 R. 2679 p. 29.)

Asher held a "continuing contract" under Texas law, which is a type of tenure.[3] (R. 1696.) The grounds for termination are specifically limited by statute. Following his acquittal, Asher met with HISD's associate superintendent for personnel, who urged him to resign. (8 R. 598-600; 3 R. 2566.) She told Asher that, although he had been acquitted, the fact that charges had been filed against him would affect the way people looked at him. Asher insisted on returning to work. The associate superintendent warned Asher to avoid any appearance of improper conduct. (8 R. 598; 3 R. 2566.) The personnel department transferred Asher to Patterson Elementary School where there was a vacancy.

When Asher was assigned to Patterson School, the Respondent Barbara Turner was the campus principal. Mrs. Turner's supervisor was the Respondent Sylvia Macy, an area superintendent. When Mrs. Turner found out that Asher had been tried for indecency, she called Mrs. Macy to find out if she had to keep him. (2 R. 2679 at 29.) Mrs. Macy called her

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[3] *See Findeisen v. Northeast Indep. Sch. Dist.*, 749 F.2d 234 (5th Cir. 1984).

own supervisor and confirmed that Asher had been charged and acquitted and was entitled to continue employment. (8 R. 754-756, 631-634; 2 R. 2679 at 29-30.) Mrs. Turner and her staff began scrutinizing Asher's interaction with students. (8 R. 744, 737-739.) Mrs. Turner prohibited Asher from giving private music lessons. (8 R. 744-745, 740-741, 738-739.)

Although no parent, teacher, or student ever complained to Mrs. Turner that Asher was improperly touching children (8 R. 735, 738), Mrs. Turner "didn't want to take any chances." (6 R. 1409.) When Asher allegedly counseled some students about personal matters, Mrs. Turner ordered him not to do this. (8 R. 695-696, 707; 2 R. 2731.) Asher allegedly looked at bruises on the leg of a student because Asher allegedly believed that the student had been abused by a relative. (8 R. 733-734, 740.) Mrs. Turner immediately asked the school nurse to conduct an investigation and talk to the student. (8 R. 734, 721-723; 2 R. 2770 at 57-58.) Mrs. Turner reprimanded Asher and ordered him to refer any students with problems or child abuse concerns to the principal, counselor, or school nurse. (8 R. 695-696.) She told him that, based on his prior problems at Frost Elementary, he could not afford even the appearance of impropriety.

In April 1990, Asher spoke at a faculty meeting about his previous acquittal to stop rumors, and he attempted to engage the faculty in a group prayer. Mrs. Turner reprimanded Asher in writing. (2 R. 2731.) The incident prompted Mrs. Turner to write a memorandum requesting a medical evaluation of Asher, but the recommendation was never processed. (8 R. 706, 734-735, 623-624.) In May 1990, although no complaints about touching had ever been received, Mrs. Macy, the area superintendent, met with Asher and issued him a global reprimand ordering him "not to question students about their private life, examine children, or be involved in any

activity that would resemble such action." (8 R. 625-626, 606-607; 2 R. 2643.) Asher was warned that a violation of the directive would result in his termination. (2 R. 2643.)

As a result of these events, the relationship between Mrs. Turner and Asher had become strained, and she requested a transfer for Asher. (8 R. 745-747, 730-732.) Mrs. Macy believed that the threat of termination would have a positive effect on Asher. (8 R. 623-624.) In July 1990, Asher was transferred to Harris Elementary School. The principal of Harris Elementary was George Smith, who had been there nearly 30 years and had a reputation for being strict. (8 R. 687, 676, 665-666.) Mrs. Macy told Mr. Smith about the incidents at Patterson Elementary. (8 R. 665-666, 621-622.) Mr. Smith told Asher that, if Mr. Smith heard any allegations about improper conduct, he would "kick his ass." (8 R. 676-677.) Mr. Smith warned Asher that even innocent touching could be misconstrued. Mr. Smith assigned Asher to a large classroom with another teacher in a concept known as "team teaching." During Asher's two years at Harris, Mr. Smith never received any complaints about Asher. (8 R. 686 pp. 12-13.)

Becerra's son, Juan Doe, attended Harris Elementary during the 1990-91 school year and the fall semester of the 1991-92 school year. According to Juan, he took music classes twice a week for one year that were taught by Asher. (R. 538, 532, 2499.) In the spring of 1992, Juan Doe began at Harris Elementary, transferred to a different school in early February, transferred back to Harris at the end of February, but permanently transferred away from Harris Elementary on March 9, 1992. (3 R. 2604-2601.)

Juan and his mother had developed a personal friendship with Asher that continued after Juan withdrew from Harris Elementary. Juan later testified at Asher's sentencing hearing that he called Asher nearly every Saturday to go places.

(3 R. 2491; 8 R. 524.) Asher took him and his brother to the zoo, Astroworld, and Sea World in San Antonio. (8 R. 535-586.) Asher gave music lessons in Becerra's home. (8 R. 573.) They participated in church activities together. (8 R. 568.) Becerra testified that she herself invited Asher's attention to make her boys happy and that she sometimes asked Asher for financial help. (8 R. 542, 545.) *It is undisputed that Becerra even gave Asher permission to sleep in the same bed as Juan and Juan's brother.* (8 R. 526-527, 523, 547.) Juan testified that Asher was "fun" and he hoped Asher would marry his mother. (3 R. 2499; 8 R. 522, 532.) Becerra even met Asher's parents. (3 R. 2512; 8 R. 546.) The district court concluded, and the Fifth Circuit agreed, that it is undisputed that HISD's officials did not know that this private relationship had developed. 105 F.3d at 1047; 921 F.Supp. at 1545 n.4.

The Petition asserts that Asher "awarded Juan marks" but did not require him to complete assignments. (Pet. at 4.) There is no competent summary judgment evidence to support this allegation, and it is not contained in either Juan's affidavit or in his expert's affidavit.

On August 29 and September 12, 1992, Asher molested Juan at Juan's own home. (8 R. 560; 6 R. 1429; 3 R. 2498; 6 R. 1201, 1197.) Asher was in the home with Becerra's permission. Asher was immediately reassigned away from the classroom. (3 R. 2600.) He submitted his resignation to the District on December 5, 1992. (3 R. 2599.) He later pled guilty to child molestation, and in January 1993, a sentencing hearing was held. Asher admitted the two acts of molestation that occurred at Juan's house. (6 R. 1224-1189.) Asher did not admit any acts against any other children. Asher was sentenced to 50 years in state prison. (6 R. 1429.)

The Petition represents that Asher had a "long, sordid" history of abusing students in HISD. No evidence in the record

supports Petitioner's assertions. There is no testimony from any other student in the record, and Asher has never admitted molesting any person except Juan Doe. Petitioner bases her assertion on Asher's *non-responses* to Becerra's requests for admissions. Asher, who is in prison, never responded to Becerra's requests for admission. Consistent with other circuits, the Fifth Circuit correctly determined that "deemed" admissions of one party cannot be used against a co-party. *Becerra*, 105 F.3d at 1048; *Riberglass Inc. v. Techni-Glass Industries Inc.*, 811 F.2d 565, 567-67 (11th Cir. 1987). Further, looking at the actual content of the requested admissions, both the district court and the Fifth Circuit determined that the deemed admissions did not establish that Asher molested Juan while he was Juan's teacher or on HISD property. 921 F. Supp. at 1544; 105 F.3d at 1048.

In her response to the motions for summary judgment, Becerra also introduced Asher's testimony from his 1993 sentencing hearing. This hearing occurred after Juan had been molested and after Asher had resigned from HISD. Asher testified at his sentencing hearing, but the only specific wrongful acts he admitted were the August and September 1992 molestations of Juan Doe. The transcript does not prove that Asher committed other wrongful acts or that the Respondents knew about any other alleged wrongful acts.

Although Becerra did not submit a summary judgment affidavit from Juan Doe, she did submit one from her expert, a doctor. The expert vaguely testified that the "enticement" of Juan began during class through "special attention and benefits." (4 R. 2187.) The affidavit contained no allegations of molestation, abuse, or fondling. Ten days after summary judgment was granted, Juan submitted an affidavit that contained vague allegations of teacher favoritism and invasions of personal space, but no specific allegations of fondling or

physical contact that was remotely sexual or abusive. (1 R. 2881.) Becerra also submitted an additional affidavit from her expert. It, too, talked about invasions of personal space, but its only specific allegation was that Asher had touched Juan's shoulder. As noted by the district court and the court of appeals, none of the affidavits supported the specific allegations of on-campus genital touching that are found in Becerra's Third Amended Complaint (the last live pleading).

The district court refused to consider the late affidavits, determining that the information in the affidavits had been uniquely available to Becerra all along. 921 F.Supp. at 1548. The Fifth Circuit concluded that the district court did not abuse its discretion in denying the request to hear late evidence. 105 F.3d at 1047 n.20.

REASONS WHY THE PETITION SHOULD BE DENIED

A. Because of evidentiary rulings made by the courts below, the Court need never reach Petitioner's Questions Presented.

Becerra's "seduction" argument is based on allegations contained in untimely affidavits that Becerra submitted after summary judgment. The excluded affidavits contain the only specific details of Asher's alleged classroom conduct. The district court declined to consider the late affidavits, and the court of appeals held that the district court did not abuse its discretion in excluding the affidavits. 105 F.3d at 1047 n.20; *cf. Lujan v. National Wildlife Federation*, 497 U.S. 871, 894-95, 110 S.Ct. 3177, 3191-92 (1990) ("The Court of Appeals' reliance upon the supplemental affidavits was wrong for a second reason: the District Court did not abuse its discretion in declining to admit them.") The excluded affidavits provide the

foundation of Petitioner's Questions Presented. Because Becerra's Petition does not complain about the lower courts' exclusion of the affidavits, and because the exclusion of the affidavits in fact was not an abuse of discretion, the Court need not even reach Petitioner's Questions Presented.

In the absence of the excluded affidavits, there is no specific evidence of Jerry Asher's classroom conduct. The only evidence offered by Becerra in responding to HISD's motion for summary judgment was an affidavit from Becerra's expert vaguely stating that Asher showed Juan "special attention and benefits" while at school.[4] (4 R. 2187.) Summary judgment affidavits must contain specific facts,[5] and those facts must be "significantly probative."[6] The district court determined that the expert's conclusory assertions were insufficient as a matter of law to create a genuine issue of material fact that an unconstitutional act occurred under color of state law. 921 F.Supp. at 1544.

The Respondents note further that Becerra's "seduction and psychological manipulation" argument did not emerge as a distinct theory until after summary judgment. The phrase

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[4]No such affidavit was submitted in response to the motion for summary judgment filed by the individual school officials. (6 R. 1454.)

[5]*Lujan v. National Wildlife Federation*, 497 U.S. 871, 888, 110 S.Ct. 3177, 3188-89 (1990) (party moving for summary judgment has a right "to demand at least one sworn averment" of the material facts "before the lengthy process of litigation continues"). Although courts "must be sensitive to the difficulties attendant" in child abuse cases, they cannot "alter evidentiary rules merely because litigants might prefer different rules in a particular class of cases." *United States v. Tome*, 115 S.Ct. 696, 705 (1995).

[6]*Anderson v. Liberty Lobby Inc.*, 477 U.S. 242, 106 S.Ct. 2505, 2511 (1986).

"psychological manipulation" does not appear in Becerra's Third Amended Complaint. Although the word "seduction" appears in the complaint, it is used only in conjunction with Becerra's discussion of alleged physical assaults. In response to the school officials' motion for summary judgment, Becerra claimed that a due process violation occurred "under color of state law *because some of the sexual molestations and assault of the minor Doe occurred while Asher was a teacher at HISD.*" (6 R. 1440, emphasis added). When Becerra filed her motion for new trial, she began urging that a student's rights may be violated by "seduction" in and of itself, without a showing of physical contact. (1 R. 2924.) The seduction theory thus is not properly before this Court.

B. The decision below does not conflict with any decision of this Court or of any circuit court.

The Fifth Circuit held that Asher did not act under color of state law when he molested Juan Doe in August and September 1992 while visiting Juan's house. The court concluded that there was "no real nexus" between "the activity out of which the violation occurr[ed] and the teacher's duties and obligations as a teacher." *Id.* at 1047 (quotation omitted). State action is an essential element of liability under 42 U.S.C. § 1983. *See West v. Atkins*, 487 U.S. 42, 48, 108 S.Ct. 2250, 2254-55 (1988). A person acts "under color of state law" when exercising power "possessed by virtue of state law and made possible only because the wrongdoer is clothed with the authority of state law." *United States v. Classic*, 313 U.S. 299, 326 (1941). The Fifth Circuit's disposition of the "under color of law" issue and substantive due process issue is consistent with the decisions from this Court and other circuit courts.

1. The question of whether Asher was acting under color of state law turns upon the unique facts of this case.

Numerous courts have held that a tortious act is not committed under color of state law merely because the tortfeasor happens to be an employee of a governmental entity. *See, e.g., Jojola v. Chavez*, 55 F.3d 488, 493 (10th Cir. 1995) (school custodian did not act under color of law when he raped student on campus); *Mark v. Borough of Hatboro*, 51 F.3d 1137, 1150 (3d Cir.), *cert. denied*, 116 S.Ct. 165 (1995) (firefighter who deliberately started fire did not commit arson under color of state law); *Pitchell v. Callan*, 13 F.3d 545, 548 (2nd Cir. 1994) (off-duty officer did not act under color of law when he shot someone with his own gun that contained police department bullets; plaintiff's subjective perception of officer's authority was irrelevant); *Barna v. City of Perth Amboy*, 42 F.3d 809 (3rd Cir. 1994) (assault with city-issued night stick by off-duty police officers arising out of personal dispute not under color of law). Teachers, like other public employees, have off-duty lives over which their employers have no control.

The Fifth Circuit's decision is virtually identical to *D.T. v. Indep. School Dist. No. 16*, 894 F.2d 1176 (10th Cir. 1990), *cert. denied*, 498 U.S. 879 (1990). In *D.T.*, a teacher who had been convicted of sodomy moved out of state to a new school district. School officials at the new school district heard vague rumors about the teacher, but no complaints were filed. *Id.* at 1177. During the summer, the teacher and three of his fifth-grade students sold candy to earn money for a summer basketball camp. The boys were molested by the teacher. In rejecting school district liability under Section 1983, the court characterized the teacher's acts as "off-duty, private" action. "We reject plaintiffs' contention that the deprivations in this

case are fairly attributable to state law because of the 'cloak of authority' held by a teacher." *Id.* at 1188.

In this case, Asher's contacts with Juan Doe occurred five months after Juan Doe left Asher's school. "Asher's contacts thereafter were in no way part of his duties as a state employee, were not school-sponsored, and were not reported to any school official." *Becerra*, 105 F.3d at 1047. Becerra would have this Court examine the application of the specific facts of this case to well-settled law, in derogation of the Court's oft-repeated admonishment that it is not a "court for correction of errors in fact finding." *Graver Tank & Mfg. Co. v. Linde Air Products Co.*, 336 U.S. 271, 275, 69 S.Ct. 535, 538 (1949).

Becerra asserts that the decision below failed to address the "failure to supervise" aspect of her claim. (Pet. at 14.) The question of whether an entity or supervisor may be held liable is separate from the question of whether a constitutional violation occurred in the first instance. *Collins v. Harker Heights, Tex.*, 503 U.S. 115, 122, 112 S.Ct. 1061, 1067 (1992); *DeShaney v. Winnebago County Dept. of Social Services*, 489 U.S. 189, 122 n.10, 109 S.Ct. 998, 1007 n.10 (1988). Asher's misconduct did not occur under color of state law and, thus, "without an underlying *constitutional* violation, there can be no § 1983 liability imposed...." *Becerra*, 105 F.3d at 1048 (italics in original). Becerra suggests that this analysis conflicts with other circuits. In the two supervisory liability cases cited by Becerra, however, the courts presumed that the perpetrator acted under color of state law. *See Andrews v. Fowler*, 98 F.3d 1069, 1073 (8th Cir. 1996) (police officer raped girl following police call to girl's home; officer threatened girl with criminal charges); *Wellington v. Daniels*, 717 F.2d 932, 935 (4th Cir. 1983) (assuming that police officer was a state actor when he

beat man with a flashlight). The decision below does not conflict with the cases cited by Becerra.

2. The Fifth Circuit's disposition of Petitioner's substantive due process claim does not conflict with any circuit court decision.

Becerra asserts that Juan would not have been sexually abused by Asher if Asher had not befriended Juan Doe while at school. The Fifth Circuit held that the Constitution is not violated by "the development of trust and affection" between a teacher and a student. 105 F.3d at 1047. No circuit court has held to the contrary.

The lower courts have held that the Due Process Clause is not violated merely because a teacher has engaged in inappropriate or otherwise offensive conduct. *See, e.g., Lillard v. Shelby County Board of Educ.*, 76 F.3d 716 (6th Cir. 1996) (upholding dismissal of claim of one girl who had been "verbally abused" and slapped by male teacher and the claim of a second girl who alleged that the teacher stared at her, made "kissing" noises, questioned her about relationships, and rubbed her stomach while making a suggestive comment); *Jane Doe "A" v. Special School Dist.*, 901 F.2d 642, 646-47 (8th Cir. 1990) (rejecting claim based on allegations that school bus driver touched or kissed students; in examining those acts, the court held it immaterial that "subsequent events proved him to be a sexual reprobate"); *see also Boldthen v. Indep. Sch. Dist.*, 865 F.Supp. 1330, 1337 (D. Minn. 1994) (rejecting a liberty interest claim premised on the allegation that school officials harassed and stared at the plaintiff and patted her on the back and hand); *Floyd v. Waiters*, 831 F.Supp. 867, 875 (W.D. Ga. 1993) (sexually suggestive comments to students do not violate the Constitution).

These decisions are consistent with this Court's previous admonishments that the Constitution does not provide a remedy for ordinary tortious conduct. *See, e.g., Daniels v. Williams*, 474 U.S. 327, 332, 106 S.Ct. 662, 665 (1986) ("we must never forget that it is a *constitution* we are expounding") (citation omitted); *Collins v. City of Harker Heights, Texas*, 503 U.S. 115, 126, 112 S.Ct. 1061, 1068 (1992).

Becerra suggests that the Tenth Circuit has recognized that substantive due process protects the right to be free from psychological abuse, citing *Abeyta v. Chama Valley Indep. Sch. Dist., No. 19*, 77 F.3d 1253 (10th Cir. 1996). Becerra distorts the actual holding of that case, which is completely in line with the *Becerra* decision. In *Abeyta*, a teacher called a twelve-year old student a "prostitute" during class and continued to call her this name for a month and a half. In *rejecting* the student's due process claim, the Tenth Circuit stated: "We have found no case in a school context that held conduct falling shy of sexual molestation or assault constitutes actionable sexual harassment." *Id.* at 1255-56. *Abeyta* also is factually distinguishable from *Becerra*. The student in *Abeyta* alleged objectively cruel mistreatment, as opposed to Juan Doe, who alleged that Asher was friendly and invaded his "personal space."[7]

The age of the students was not a relevant factor in any of these cases. Although juveniles may not have the maturity of adults, this limitation does not emanate from any *state-created* restraint and, thus, due process concerns are not

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[7]Becerra also claims that Asher fondled Juan's genitals during after-school private music lessons. Both the district court and the Fifth Circuit noted that *no* evidence supported this allegation. 921 F. Supp. at 1548 n.1; 105 F.3d at 1047 n.20. Even Juan Doe's untimely affidavit did not contain any allegations of sexual contact. 921 F.Supp. at 1549.

implicated. *See Black v. Indiana Area School Dist.*, 985 F.2d 707, 714 (3rd Cir. 1991); *Robertson v. City of Plano,* 70 F.3d 21, 25 (5th Cir. 1995); *see also Dorothy J. v. Little Rock Sch. Dist.*, 7 F.3d 729, 732 (8th Cir. 1993) (student's mental retardation not a relevant in abuse case; state did not create the child's disability).

Becerra suggests that the decision below conflicts with *New York v. Ferber*, 458 U.S. 759, 102 S.Ct. 3348 (1982) and *Globe Newspaper Co. v. Superior Court for the County of Norfolk*, 457 U.S. 596, 102 S.Ct. 2613 (1982). Neither case is legally or factually relevant to Juan Doe's situation. *Ferber* and *Globe* involved First Amendment challenges to statutes designed to protect minors from child pornography (*Ferber*) and from invasion of privacy during sexual abuse trials (*Globe Newspaper*). The question in those cases was whether, consistent with the First Amendment, the state *may* adopt statutes designed to protect minors. Here, the inquiry is whether the Fourteenth Amendment *mandates* protection.

The decision below also does not conflict with the Seventh Circuit's decision in *K.H. by and through Murphy v. Morgan*, 914 F.2d 846 (7th Cir. 1990), a case that Becerra never cited in the district court or court of appeals. In *K.H.*, the state removed a child from the custody of her parents and placed her in a series of foster homes where she allegedly was subjected to repeated rounds of alleged sexual abuse from foster parents that the state allegedly suspected to be child abusers. In reviewing the defendants' motion to dismiss under Rule 12(b)(6), the court of appeals determined that the child had stated a due process claim. The opinion makes it clear that the foundation of the child's claim was the state's removal of her from her own home. "[H]aving removed her from [her parents] custody the state assumed at least a limited responsibility for her safety." *Id.* at 849. *K.H.* does not stand

for the broad proposition that the Due Process Clause generally protects "a person's mental health." The limited scope of *K.H.* is underscored by a subsequent decision of the Seventh Circuit. *See Camp v. Gregory*, 67 F.3d 1286, 1292-93 (7th Cir. 1995), *cert. denied*, 116 S. Ct. 2498 (1996) ("We believe the fact that the [the state] had been made Anthony's guardian represents a key point of distinction from *DeShaney*"). There is no conflict between and *K.H.* and *Becerra.*

Becerra also does not conflict with an earlier Seventh Circuit case cited by Petitioner, *White v. Rochford*, 592 F.2d 381 (7th Cir. 1979), a pre-*DeShaney* case in which police officers arrested a driver and abandoned his three young passengers along the highway on a cold night in a "health endangering" situation. The key to the theory in that case is the state actors' culpable knowledge "in 'affirmatively placing an individual in a position of danger, effectively stripping a person of her ability to defend herself, or cutting off potential sources of private aid.'" *Becerra*, 921 F.Supp. at 1545. The danger must be immediate. *Johnson v. Dallas Indep. Sch. Dist.*, 38 F.3d 198, 201 (5th Cir. 1994), *cert. denied*, 115 S.Ct. 1361 (1995). The requirement of immediate danger means that the harm has a limited range and duration. *See Graham v. Indep. Sch. Dist.*, 22 F.3d 991, 995 (10th Cir. 1994); *cf. Martinez v. California*, 444 U.S. 277 (1980) (holding that parole board was not liable for murder of girl by parolee and observing that board was not aware that the girl, as distinguished from the public at large, faced any danger). The district court found that Juan's private sources of aid were never cut off. 921 F.Supp. 1545.

Becerra claims that the Fifth Circuit's decision conflicts with the Fifth Circuit's decision in *Doe v. Taylor Independent School District,* 15 F.3d 443 (5th Cir. 1994). Becerra's argument does not justify review by this Court. It is the duty

of the Fifth Circuit to maintain uniformity of the decisions from that circuit. Becerra sought--and was denied--*en banc* review of the panel decision below. Further, there is no conflict between *Becerra* and *Taylor*. *See Becerra*, 105 F.3d at 1047.

In the end, Becerra urges the Court to grant certiorari--not because there is a substantial conflict among the circuits--but because the courts below agree that the Due Process Clause is not violated by tortious or offensive conduct. Becerra then proceeds to ask the Court to recognize a new constitutional right, stating that "the law must keep up with the real world." (Pet. at 10.) Becerra argues that an affirmative constitutional duty to protect arises "when the child is rendered susceptible and vulnerable by state action to sexual manipulation by a school teacher." (Pet. at 11.) The parameters of this supposed right are vague and problematic. For example, as the district court noted, "any of innumerable examples of acceptable physical contact" may occur within the context of a teacher/student relationship. 921 F.Supp. at 1449. Is "special attention" by itself actionable as a violation of substantive due process? Under Becerra's proposal, the scores of teacher who legitimately mentor their students or show particular kindness to students would constantly be suspect, and school administrators would have to learn psychiatry and police tactics to supervise them.

Because the decision below conflicts with no decision of this Court or of any other circuit, the Petition should be denied.

3. Becerra's argument that schools have a special constitutional duty to protect school children has been rejected by every circuit court to consider the issue.

Becerra argues that the "greater custodial responsibility" of schools over elementary age children justifies "a heightened level of protection from in-school sexual seduction." (Pet. at 10.) The Fifth Circuit, along with every other court of appeals to consider the issue, has rejected the argument that there is a constitutionally mandated "special relationship" between students and their schools. *See Jojola v. Chavez*, 55 F.3d 488, 491 n.2 (10th Cir. 1995); *D.R. by L.R. v. Middle Bucks Area Voc. Tech. Sch.*, 972 F.2d 1364, 1368-73 (3d Cir. 1992) (en banc), *cert. denied*, 506 U.S. 1079, 113 S. Ct. 1045 (1993); *Doe v. Claiborne Cnty., Tenn.*, 103 F.3d 495, 510 (6th Cir. 1996); *J.O. v. Alton Community Unit Sch. Dist. 11*, 909 F.2d 267, 272 (7th Cir. 1990); *Dorothy J. v. Little Rock Sch. Dist.*, 7 F.3d 729, 732 (8th Cir. 1993); *Doe v. Hillsboro Indep. Sch. Dist.*, 113 F.3d 1412, 1415 (5th Cir. 1997); *Maldonado v. Josey*, 975 F.2d 727, 732 (10th Cir. 1992), *cert. denied*, 507 U.S. 914, 113 S.Ct. 1266 (1993); *see also DeShaney v. Winnebago Cnty. Dept. of Social Services*, 489 U.S. 189, 201, 109 S.Ct. 998, 1006 (1989) (rejecting the claim that a "special relationship" had been created between a child and the state; the fact that the state had once assumed custody of the boy did not make the State "the permanent guarantor of an individual's safety by having once offered him shelter.")

Becerra has failed to show a conflict meriting review by the Court.

C. **Granting the Petition would be futile because, even if Juan Doe could show a constitutional violation under color of state law, the Respondents would still be entitled to summary judgment.**

Assuming *arguendo* that the Petitioner's theory had merit, the Court should not grant certiorari because doing so would be futile. Even if the Fifth Circuit applied an erroneous standard, the ultimate disposition of the motions for summary judgment would be the same: they would be granted, and Petitioner's claim would be dismissed.

First, as previously noted, Becerra's affidavits were excluded from consideration because they were untimely. Thus, even if the "seduction" theory is viable, Becerra offered no evidence to support it.

Second, the individual school administrators asserted the defense of qualified immunity, which provides that public officials serving in a discretionary capacity may not be held liable so long as their conduct does not violate law that was "clearly established" at the time in question. *Mitchell v. Forsyth*, 472 U.S. 511, 524, 105 S.Ct. 2806, 2814 (1985). Becerra's "seduction" theory was not clearly established in 1990 when Jerry Asher was transferred to Juan Doe's school (indeed, the theory is not "clearly established" in 1997). Becerra conceded in her brief to the Fifth Circuit that her theory is merely a proposal and not "clearly established" law. (Appellant's Brief at iv-v.)

Even if the "seduction" theory were clearly established, the individual school administrators would be immune on the additional ground that none of them were "deliberately indifferent" to allegations of sexual abuse. The circuits that have addressed this subject have required evidence of "deliberate indifference" to plain signs of sexual abuse before

a school official will forfeit his or her qualified immunity. *Doe v. Taylor Indep. Sch. Dist.*, 15 F.3d 443 (5th Cir. 1994) (school administrator may lose immunity if he is deliberately indifferent to facts indicating that the student is being sexually abused); *Jane Doe "A,"* 901 F.2d at 646-47 (supervisors not deliberately indifferent in light of facts known to them at time, even where subsequent events shows bus driver to be a "sexual reprobate"); *Black v. Indiana Area Sch. Dist.*, 985 F.2d 707, 712-13. (3rd Cir. 1993) (supervisor's failure to conduct a more thorough investigation into allegations of sexual abuse by bus driver did not cause later molestation and did not indicate deliberate indifference); *Kinman v. Omaha Public Sch. Dist.*, 94 F.3d 463 (8th Cir. 1996) (no deliberate indifference shown despite numerous allegations of lesbian relationship between teacher and high school girl); *Stoneking v. Bradford Area Sch. Dist.*, 892 F.2d 720, 731 (3rd Cir. 1989) ("inaction and insensitivity" by superintendent not enough to rise to level of deliberate indifference). Deliberate indifference means more than a "negligent failure to recognize [a] high risk of harm," *Black*, 985 F.2d at 712-13, and it cannot be judged based on hindsight, *Jane Doe "A,"* 901 F.2d at 646-47.

The administrators sued by Becerra--Dr. Raymond, Mrs. Macy, and Mrs. Turner--knew nothing about any non-school relationship between Asher and Juan Doe. *See Becerra*, 921 F. Supp. at 1545. Indeed, Dr. Raymond had left HISD and moved to Illinois over a year and a half before Asher molested Juan. The other administrators, Mrs. Turner and Mrs. Macy, never received specific allegations of touching or abusive acts by Asher against Juan Doe or any other student, but they nonetheless took specific action with respect to the few allegations that were raised and, thus, they were not "deliberately indifferent." They scrutinized Asher's conduct, banned private music lessons, reprimanded Asher in writing,

and threatened him with termination. At his new school, Asher was placed in a "team teacher" situation and thus was seldom alone with students, and no other concerns about inappropriate behavior were ever reported to Mrs. Macy during the two years Asher worked at Juan's school. (R. 2679, p. 56.) Their alleged inaction or insensitivity does not constitute "deliberate indifference." *See Stoneking*, 892 F.2d at 731.

Granting certiorari also would be futile with respect to the claims against the school district. A local government may only be held liable under Section 1983 only if the constitutional injury was caused by the execution of an official policy, custom, or practice by government officials who have final policy-making authority. *Monell v. Dep't of Social Services,* 436 U.S. 615, 98 S.Ct. 2018 (1978). The plaintiff also must establish that the policymaker acted with deliberate indifference. *See Board of County Commissioners of Bryan County v. Brown*, 117 S.Ct. 1382 (1997). The summary judgment evidence presented below showed that the HISD Board of Education adopted specific policies and procedures to protect the safety and welfare of students and that HISD did not maintain a policy or custom of ignoring complaints about sexual abuse but, rather, investigated complaints and disciplined or terminated alleged violators. The reinstatement of Asher after his 1987 acquittal is insufficient to generate a question of fact on the question of deliberate indifference. *See, e.g., Jones v. Wellham*, 104 F.3d 620 (11th Cir. 1997) (plaintiff alleged that she was raped by a police officer; county could not be held liable even though the police officer had been accused of rape 11 years earlier); *Jones v. City of Chicago*, 787 F.2d 200, 203 (7th Cir. 1986) (city could not be held liable for retaining a doctor who had previously been investigated and cleared of a sexual assault claim when he allegedly sexually assaulted a second woman).

Regardless of the merits of Becerra's arguments, because numerous other grounds justify summary judgment in this case, granting certiorari would be futile. Therefore, the Petition should be denied.

CONCLUSION

For the foregoing reasons, the petition for writ of certiorari should be denied.

DATED: August 14, 1997.

Respectfully submitted,

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